

IT 00-22

Tax Type: Income Tax

Issue: Withholding Tax – Failure to File Return/Make Payment

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

**ABC HEATING, CORP., d/b/a
XYZ CO.,**

TAXPAYER

**No. 99-IT-
FEIN:**

**Kenneth Galvin
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

APPEARANCES: Mr. JOHN DOE, president, for ABC Heating Corporation and Mr. Ralph Basset appearing on behalf of the Illinois Department of Revenue,

SYNOPSIS:

This matter comes on for review pursuant to ABC Heating Corporation's (hereinafter "taxpayer") timely protest of the Notice of Deficiency ("NOD") issued on January 7, 1999, proposing an assessment of tax, penalty and interest for the second quarter of 1991. The Illinois Department of Revenue (hereinafter the "Department") maintains that the taxpayer withheld Illinois income tax from the compensation paid to its employees but did not pay such monies over to the Department or file a tax return as required under Section 704 and 705 of the Illinois Income Tax Act. A default judgment was entered against the taxpayer on February 8, 2000. Taxpayer timely moved for a rehearing. The rehearing was held on April 26, 2000, with JOHN DOE

testifying for the taxpayer. Following the submission of all evidence and a review of the record, it is recommended that the NOD be finalized as issued.

FINDINGS OF FACT:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the NOD issued on January 7, 1999, showing a total liability due and owing for the second quarter of 1991 in the amount of \$1000.73, including penalty and interest, less a payment of \$120.57. Dept. Ex. No. 1.
2. On February 10, 1999, taxpayer protested the NOD. Dept. Ex. No. 2.
3. The withholding tax assessed for the second quarter of 1991 was estimated based on the filing for the first quarter of 1991. Tax withheld for the first quarter of 1991 was \$1130.53 or \$12.56 per day. Taxpayer's business was closed and taxpayer declared bankruptcy on May 8, 1991. The withholding tax for the second quarter was estimated to be \$477, which is equal to \$12.56 per day multiplied by 38 days. Dept. Ex. Nos. 4, 5 and 7.
4. As of January 10, 2000, no IL-941, "Employer's Quarterly Illinois Withholding Tax Return," was filed for the taxpayer for the second quarter of 1991. Dept. Ex. No. 3.
5. Taxpayer's bankruptcy was closed on June 9, 1994. Dept. Ex. No. 5.
6. Taxpayer made a payment of \$120.57 in the second quarter of 1991 which has been credited to the taxpayer on the NOD. Dept. Ex. No. 6.

CONCLUSIONS OF LAW:

The Department issued the NOD claiming that the taxpayer failed to file withholding tax returns and pay the taxes deducted from its employees' wages to the State of Illinois as required under Sections 704 and 705 of the Illinois Income Tax Act. Section 705 states in pertinent part:

Employer's Liability for Withheld Tax:

Every employer who deducts and withholds or is required to deduct and withhold tax under this Act is liable for such tax.

For purposes of assessment and collection, any amount withheld or required to be withheld and paid over to the Department, and any penalties and interest with respect thereto, shall be considered the tax of the employer.

35 ILCS 5/705.

Every employer who is required to deduct and withhold tax on compensation paid in Illinois must file a quarterly return in the quarter in which such tax is deducted. Form IL-941, "Illinois Employer's Quarterly Withholding Tax Return," is prescribed for this filing. Mr. DOE admitted at the evidentiary hearing that an IL-941 had not been filed for the second quarter of 1991:

Q. The Illinois records also indicate that ABC Heating did not file Form 941 for the second quarter; is that correct?

A. To the best of my knowledge, that is correct.

Tr. p. 21.

Michael L. Cain, Records Manager for the Department, certified that he had diligently searched the records of the Department, and that no Illinois employers' quarterly withholding tax returns for the second quarter of 1991 had been processed as of January 10, 2000. Dept. Ex. No. 3. Based on this certification and the taxpayer's statement, above, I conclude that an IL-941 was not filed for the second quarter of 1991. Accordingly, the Section 1001 penalties for failure to file the required tax returns by the date prescribed are appropriately assessed against the taxpayer. 35 ILCS 5/1001.

Taxpayer argued at the evidentiary hearing that, although no IL-941 had been filed, the withholding taxes at issue have been paid. Taxpayer had admitted as evidence copies of six cancelled checks, all payable to the Illinois Department of Revenue. The earliest of these checks is dated September 11, 1992, and the latest check is dated March 17, 1997. The checks are for the following amounts: \$115, \$50, \$128.15, \$53.98, \$315, and \$66.21. All six checks were drawn on the personal account of "JOHN DOE and JANE DOE." Four of the six checks are signed by

“JANE DOE,” and these checks contain the social security number of JOHN DOE at the top of the check. One of these four checks also contains the social security number of JANE DOE. There is no “Memo” notation on any of the six checks. Taxpayer’s Ex. Nos. 1-4.

Taxpayer also had admitted as evidence copies of JOHN and JANE DOE’s IL-1040 forms for tax years 1988 through 1997. The 1988 and 1989 IL-1040’s are signed only by a tax preparer, dated November 28 and 29, 1990, respectively, and show overpayments of \$35 and \$154, respectively. The 1990 IL-1040 is signed by the tax preparer only, dated March 28, 1991, and shows an overpayment of \$875. The 1991, 1992, and 1993 IL-1040’s are unsigned, all are dated December 27, 1994, and show amounts due of \$0, \$119, and \$122, respectively. The 1994 IL-1040 is signed by JOHN DOE only, dated September 22, 1995, and shows an amount due of \$99.40. The 1995 IL-1040 is signed by JOHN DOE only, dated April 14, 1996, and shows an amount due of \$7.60. The 1996 IL-1040 is signed by JOHN DOE only, dated April 13, 1997, and shows an amount due of \$22. The 1997 IL-1040 is signed by JOHN and JANE DOE, dated April 13, 1998, and shows an amount due of \$63.00 Taxpayer’s Ex. No. 5.

The six checks written to the Illinois Department of Revenue total \$728.34. The IL-1040’s from 1992 through 1997 show a total amount due to the State of \$432.00. Mr. DOE argued as follows:

Just to reiterate, the amount paid by myself to the Illinois Department of Revenue far exceeds the amount of anything that I could have possibly owed on my personal taxes. Therefore, this money went to ABC Heating [for the] quarter in question, and I know that for a fact. Tr. p. 30.

Mr. DOE also maintained that he had previously settled this matter with Irma Rogers, a Department employee. Tr. p. 26. Taxpayer was certain that “there were statements or papers” that he had

received “saying that this was a settled matter,” but he was not able “put his hands on [them] after all of these years.” Tr. pp. 25-26.

There are several problems with Mr. DOE’s arguments. First, the checks do not carry any notation that they should be directed toward the liability of ABC Heating Corporation, rather than the personal tax liability of JOHN and JANE DOE. Four of the checks have Mr. DOE’s social security number on them. One of these checks has both JOHN and JANE’s social security number on it. The checks with social security numbers written on them were all signed by “JANE DOE.” Mr. DOE testified that his wife, who was apparently not an officer of ABC Heating Corporation, would not have known to put an “FEIN” number on the checks, and she would have thought that putting Mr. DOE’s social security number on them would have ensured proper routing. Tr. pp. 22-25. I am unable to conclude that any of these checks were applied to the outstanding tax liability of ABC Heating.

Second, the tax returns for 1988, 1989, 1991, 1992, 1993 and 1994 were filed late, according to the dates on the returns. Since these returns were filed late, it is likely that Mr. and Mrs. DOE had to pay late filing and late payment penalties and interest on the unpaid taxes. Whereas the dollar amount of the checks written to the Illinois Department of Revenue exceeds the total of the tax liability as shown on the returns, I am unable to conclude that the excess was applied to the taxes of ABC Heating Corporation, and not applied to cover the penalties and interest accruing from the DOE’s late filing and late payment of their individual taxes.

Finally, Mr. DOE testified that he had previously settled this matter with Irma Rogers, a Department employee. Taxpayer’s request for a rehearing was granted on March 9, 2000, with the rehearing scheduled for April 26, 2000. Taxpayer had more than enough time to subpoena Ms. Rogers for the evidentiary hearing. I am unable to conclude, based on Mr. DOE’s testimony and the

lack of any documentary evidence, that this matter had previously been settled with the Department.

Pursuant to Illinois statute, an NOD is *prima facie* correct and is *prima facie* evidence of the correctness of the amount of tax due, as shown therein. 35 ILCS 5/904. In order to overcome this presumption of validity, the taxpayer must produce competent evidence identified with their books and records and showing that the Department's returns are incorrect. Oral testimony is not sufficient to overcome the *prima facie* correctness of the Department's determinations. A. R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826 (1st Dist. 1988). I am unable to conclude, based on Mr. DOE's testimony, and the less than competent evidence presented by him at the hearing, that ABC Heating Company's liability for withholding taxes for the second quarter of 1991 had previously been paid or settled. The taxpayer has failed to rebut the *prima facie* case of the Department.

WHEREFORE, for the reasons stated above, it is my recommendation that the NOD be finalized as issued for the second quarter of 1991.

ENTER:

Date: June 13, 2000

Kenneth Galvin
Administrative Law Judge